RE HO FOK, EX P ANN BEE (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[BANKRUPCTY NO: D5-29-5030-1999]
15 JANUARY 2002

BANKRUPTCY: *Petition - Petition presented by corporation - Whether director of corporation must state that he is authorised to present petition under seal of corporation - Whether r. 215 Bankruptcy Rules 1969 should be read with s. 133 Bankruptcy Act 1967*

The judgment debtor opposed the bankruptcy petition by the judgment creditor company ('the company') on the ground that the director of the company, one Mr. Lee who had presented the petition on behalf of the company, was not authorised to do so. The reason being that Mr Lee failed to state in the petition and in the affidavit verifying the petition that he was authorised under the seal of the company to present the petition contrary to r. 215 of the Bankruptcy Rules 1969 ('the Rules') read with s. 133 of the Bankruptcy Act 1967 ('the Act'). Consequently, it was argued that the petition should be dismissed as it was void and ineffective.

Held:

[1] In *Re Kang Chong Yeow* it was held that there were three ways by which a corporation may present a petition: (1) by an officer of the corporation acting in his own name, in which case he has to state that he is such officer duly authorised under seal; (2) by an officer of the corporation on its behalf; (3) by an agent who is not an officer of the corporation in the ordinary course, but is deemed to be an officer for the purpose of presenting a petition and therefore authorised under the seal of the corporation. As in that case, the petition herein was signed by a director of the company and therefore fell within that limb of r. 215 of the Rules that allows a petition to be "presented by the corporation, and signed by the officer on its behalf". It does not require the person to state that he has been authorised under the seal of the company. (pp 226 f-i & 227 a-d)

[2] Being an artificial person, a company can only act by delegating its power to its directors. Generally the scope of that delegated power is defined under its articles of association which would invariably have to include the power provided in Table A of 4th Schedule to "exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting." It follows therefore if a petition is signed by a director of a company as in the instant case, it must be accepted as a matter of course that it is presented by the company under such a delegated power. (p 228 f-g)

[3] There is hardly any justification to read r. 215 of the Rules in conjunction with s. 133(a) of the Act that in all three instances of presenting a petition of a corporation under r. 215, the officer must be authorised under the seal of the corporation. Section 133(a) of the Act merely states that for the purpose of the Act a corporation may act by any of its officers authorised under the seal of the corporation so to act. It does not say that the corporation must at all costs and in all cases act only by its officer who must be authorised under the seal of the corporation. The section is therefore purely directory and not mandatory in nature. (pp 228 h-i & 229 a-b)

[4] There is a common law presumption that every official act is presumed to have been regularly performed. Where therefore on the face of it a petition indicates that it is being presented by an officer of the corporation, a party questioning the legality of its issuance must first show some credible evidence that he has reason to believe that it has not been issued with the authority of the corporation. It is insufficient merely for him to point to some perceived irregularities in the petition and apply for the petition to be dismissed. (p 229 f-g)

[5] Whereas when a pleading is challenged on valid ground with respect to the authority of the issuer to act for a company, the court has always resolved it by staying the proceeding in order to allow the company to determine positively whether he has been authorised to commence the proceeding and where appropriate to ratify or rectify any defects that may arise. The same practice should apply to any petition including a bankruptcy petition. The judgment debtor is not therefore at liberty to raise what he had perceived as an irregularity on the face of the petition as a ground to dismiss the petition. (pp 229 h-i & 230 a)

[Appeal dismissed.]

Case(s) referred to:

Avel Consultants Sdn Bhd & Anor v. Mohd Zain Yusof & Ors [1984] 2 CLJ 169; [1984] 1 CLJ (Rep) 482 ***(refd)***

Pender v. Lushington [1877] 1 Ch D 70 ***(refd)***

Re Kang Chong Yeow [2001] 3 MLJ 98 ***(foll)***

Re Lim Chooi Sang, ex p Soon Fay Sdn Bhd [1999] 5 MLJ 605 ***(not foll)***

Re Mat Shah Safuan ex p United Asian Bank Bhd [1991] 2 MLJ 48 ***(foll)***

Re Samuel Pakianathan Jabamanickam ex p Perwira Habib Bank Malaysia Bhd [1996] 2 AMR 2055 ***(not foll)***

Re Yong Tet Yin, ex p United Overseas Bank Ltd [1996] 1 CLJ 158 ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, s. 133(a)

Bankruptcy Rules 1969, r. 215

For the appellant/judgment debtor - SM Kam; M/s SM Kam & Assoc
For the respondent/judgment creditor - KK Lee; M/s YM Chin & Lee

Reported by Usha Thiagarajah

JUDGMENT

Kang Hwee Gee J:

Following a hearing before the senior assistant registrar on 30 July 2001 an adjudication order and a receiving order were made against the judgment debtor based on the judgment debt of RM463,291.41 obtained by the judgment creditor from the Shah Alam High Court on 3 September 1999.

The judgment debtor now appeals against the said decision.

The bankruptcy petition was presented for the judgment creditor's company by its director Mr. Lee Neh @ Lee Pins Ten.

The judgment debtor opposed the petition on the ground that the said Mr. Lee had failed to state in his petition and also in the affidavit verifying the petition that he was authorised under the seal of the judgment creditor to present the petition. Both the petition and the affidavit it was contended, had offended r. 215 of the Bankruptcy Rules 1969 read with s. 133 of the Bankruptcy Act 1967 and had thereby rendered the petition void and ineffective. Consequently, it was argued, the petition should have been dismissed.

Section 133(a) of the Bankruptcy Act 1967 reads as follows:

> For all or any of the purposes of this Act:
>
> (a) a corporation may act by any of its officers in that behalf under the seal of the corporation.

Rule 215 of the Bankruptcy Rules 1969 reads as follows:

> Where a corporation presents a petition or takes any other action under this Act, the officer of the corporation may act in his own name, stating that he is such officer duly authorised under seal; but a petition may be presented by the corporation, and signed by the officer on its behalf. Any person chosen by the corporation to act for it as agent, is an 'officer' within s. 133, and if duly authorised under seal can act for the corporation.

Counsel for the judgment debtor relied on the judgment of Steve Shim J (as he then was) in *Re Lim Chooi Sang, ex p Soon Fay Sdn Bhd* [1999] 5 MLJ 605 at 609 in which he had ruled as follows:

> In any event, I am more inclined to accept the construction adopted by the court in *Re Samuel Pakianathan (supra)*. In my view, r. 215 has to be read with s. 133 of the Bankruptcy Act. Reading the second limb in r. 215 with s. 133, it would seem clear that any officer presenting a creditor's petition on behalf of a corporation has to be duly authorised under seal. In the case of a corporation presenting a creditor's petition by an officer authorised in that behalf, there is no necessity for a board resolution granting the authorisation to be under seal provided that the seal of the corporation is affixed to the authorisation: See *Re Midgley* [1913] 68 LT 45.
>
> Having regard to the views I take, I am bound to hold that the JC has not shown that Encik Chong Che Chong (a director of the JC) who presented the creditor's petition on behalf of the JC, a corporation, had been duly authorised under seal to do so at the material time. Neither the creditor's petition nor the affidavit of truth of statement deposed by Encik Chong Che Chong give any indication that there was an authorisation under seal. In the circumstances, and for the reasons stated, I find there is substance in the first ground advanced by the JD.

His Lordship followed the reasoning of RK Kamalanathan Ratnam JC (as he then was) in the earlier case of *Samuel Pakianathan a/l Jabamanickam, Re Ex parte Perwira Habib Bank Malaysia Berhad* [1996] 2 AMR 2055 at 2076 wherein an "officer duly authorised" in r. 215 was read in conjunction with s. 133(a) of the Act to mean "one who has been authorised under the seal of the corporation", and consequently, it was held that the officer presenting the petition of the company must still have to be one who has been authorised under the seal of the corporation.

The decision appears to be at variance with the judgment of Abdul Wahab Patail J in *Re Kang Chong Yeow* [2001] 3 MLJ 98 wherein he had commendably analysed r. 215 of the Bankruptcy Rules 1969. He found that there were three ways by which a corporation may go about to present a bankruptcy petition under that rule. The judgment creditor's company in that case, it was held, was perfectly entitled to present the petition by its executive director notwithstanding that he may not have been authorised under seal. This was what he said at p. 112 of the judgment:

> It is clear from the first part of r. 215 that where a company presents a petition or takes any other action under this Act, it may do so firstly by an officer of the corporation acting in his own name, in which case he has to state that he is such officer duly authorised under seal; and secondly a petition may also be presented by the corporation and signed by an officer of the corporation on its behalf. The next part of the rule applies to a third method of presenting a petition, that is by an agent, who is not an officer of the corporation in the ordinary course, but is deemed to be an officer for the purpose of presenting a petition; and since such agent is an independent entity outside the corporation, he would need to be duly authorised under seal before he can present a petition for the corporation.

> The proceeding in this case, however, is clearly undertaken under the second alternative, that is by the company Mivan Far East Sdn Bhd. The affidavits deposed by James Martin Laughlin states clearly that he is the executive director of the judgment creditor (respondent) and that he has been authorised to make the affidavit on behalf of the respondent. Nothing in this proceeding shows that it is being undertaken by James Martin Laughlin himself on behalf of Mivan Far East Sdn Bhd. In the circumstances, the objection under r. 215 is unsustainable on the facts ... .

I am with respect inclined to agree with the decision of Abdul Wahab Patail J in *Re Kang Chong Yeow*.

As in *Re Kang Chong Yeow*, the petition in the instant case was signed by a director of the judgment creditor Mr. Lee Neh @ Lee Pins Ten. It therefore falls squarely within that limb of r. 215 that allows a petition to be "presented by the corporation, and signed by the officer on its behalf". It does not therefore require the person to state that he had been authorised under seal.

The view that a corporation may act by itself through its officers under the second limb of r. 215 without having to be authorised under seal is shared by two other High Court decisions.

Hence in *Re Yong Tet Yin, ex p United Overseas Bank Ltd* [1996] 1 CLJ 158, a bankruptcy petition presented by a person acting purely as "the manager and attorney" of the judgment creditor, the United Overseas Bank Ltd was held to be perfectly valid. The court considered both the provisions of r. 215 and s. 133 of the Act but did not consider it necessary to attach any significance to the words "authorised on that behalf under the seal of the corporation" in s. 133 of the Act. Tee Ah Sing JC, as he then was, held (correctly, in my view) that:

> From the petition it is clear that it is presented by the judgment creditor, a corporate body, and signed by Wong Chee Kiong, the manager and attorney of the judgment creditor. Thus the petition is presented under the second limb of r. 215 of the Rules. The creditor's petition was filed in compliance with r. 99 of the Rules and the form No. 9.

The decision in *Re Yong Tet Yin* seems to ride in tandem with another rational High Court decision – that of Siti Norma Yaakob J (as she then was) in *Re Mat Shah bin Safuan* [1991] 2 MLJ 48 where both r. 215 and s. 133(a) of the Act were considered. The petition was presented by an attorney and manager of the judgment creditor, and as in *Re Yong Tet Yin*, the words "authorised on that behalf under the seal of the corporation" was not read into r. 215. Her Ladyship said at p. 49 of her judgment:

> From the petition in these proceedings, it is clear that it is presented by the judgment creditor, a corporate body and signed by S Sinnappan, the manager and attorney of the judgment creditor (a bank). Thus the petition is presented under the second limb of r. 215. The power of attorney dated 23 May 1973 gives wide powers to S Sinnappan to act on behalf of the judgment creditor and under cl. 8(d) it expressly states that he can act singly on behalf of the judgment creditor in all matters arising out of the bankruptcy of any person indebted to the bank. By virtue of his official position alone, he has every authority to present a petition on behalf of the judgment creditor and there is no question that he needs the authority to use the seal of the judgment creditor or that there must be a board resolution passed authorising him to use the seal. This is only relevant where the corporation chooses an agent, who is not a bank officer, to act on its behalf and under those circumstances the agent is referred to as "an officer" within the meaning of s. 133(a) of the Act.

More however, need to be said of the function and power of the director of the company to provide the rationale for that aspect of the rule.

As the learned authors of *Chan & Koh's Company Law*, wrote at 6.101 of their work:

> A company being a fictitious persona 'cannot act in its own person, for it has no person'. Any proposition about a company necessarily involves a reference to a set of rules by which acts are attributed to the company. This set of rules has been described as the 'rules of attribution' which are said to contain the 'primary rules of attribution' and 'general rules of attribution'. A company being a *persona ficta* may only act through the agency of natural persons.

Being an artificial person therefore, a company can only act by delegating its power to its directors. Generally the scope of that delegated power is defined under its articles of association which would invariably have to include the power provided in Table A of 4th Schedule to **"exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting."**

It follows therefore, if a petition is signed by a director of a company as in the instant case, if must be accepted as a matter of course that it is presented by the company under such a delegated power. There is hardly any ground to question the legality of its presentation. The petition has been as immaculately conceived as it could possibly have been.

In my considered view there is hardly any justification to read r. 215 in conjunction with s. 133(a) of the Act and to find therefrom that in all the three instances of presenting a petition of a corporation under r. 215 the officer must be authorised under the seal of the corporation, and that a failure to state so in the petition renders the petition void and ineffective.

Section 133(a) of the Act merely says that for the purpose of the Act a corporation may act by any of its officers authorised under the seal of the corporation so to act. It does not say that the corporation must at all costs and in all cases act only by its officer who must be authorised under the seal of the corporation. The section is therefore purely directory and not mandatory in nature.

It would be ideal if a corporation decides to act in harmony with the requirement. But the fact that the authority to act was not given to him under the seal of the corporation does not *ipso facto* mean that the officer does not have the authority to act for the corporation and that the petition should be dismissed forthwith.

The purpose of r. 215 Bankruptcy Rules 1969 and s. 133(a) of the Bankruptcy Act 1967 is merely to prescribe a format within which a corporation should go about in presenting a bankruptcy petition thereby providing in the process some form of orderliness and certainty – as where for instance an officer can positively assert in the petition itself that he had been authorised under the seal of the corporation to present the petition there could be little in the way of his standing that can be questioned – for has he not with him the very seal of the corporation?

But that does not necessarily mean that the petition should be rejected by the court merely because the officer did not follow this procedure if he could show by other convincing means that he has indeed been authorised to act for the corporation, such as by a resolution of the Board of Directors as the petitioner did in the instant case.

There is a common law presumption that every official act is presumed to have been regularly performed. Where therefore on the face of it a petition indicates that it is being presented by an officer of the corporation, a party questioning the legality of its issuance, must first show by some credible evidence that he has reason to believe that it has not been issued with the authority of the corporation. It is insufficient merely for him to point to some perceived irregularities in the petition and apply for the petition to be dismissed.

Whereas when a pleading is challenged on valid ground with respect to the authority of the issuer to act for a company, the court has always resolved it by staying the proceeding in order to allow the company to determine positively whether he has been authorised to commence the proceeding and where appropriate to ratify or rectify any defects that may arise. See *Pender v. Lushington* [1877] 1 Ch. D 70; *Avel Consultants Sdn Bhd & Anor v. Mohd. Zain Yusof & Ors* [1984] 2 CLJ 169; [1984] 1 CLJ (Rep) 482. The same practice should apply to any petition including a bankruptcy petition.

The judgment debtor in this case is not therefore at liberty to raise what he had perceived as an irregularity on the face of the petition as a ground to dismiss the petition.

The appeal is dismissed with costs.